intention to serve residential customers as of June 30, 1997. Indeed, the only specific evidence he points to of any intention to serve residential customers takes the form of a general tariff filed with the SCPSC after the SCPSC issued its Compliance Order endorsing BellSouth's Track B application.[13]

Prior to filing its tariff, ITC DeltaCom consistently maintained that it would serve business, not residential, customers. For example, although Mr. Moses relies on a public announcement during the second quarter of 1997 to show that ITC DeltaCom intended to offer local exchange service at that time, Moses Aff. ¶ 21, the statement to which he apparently refers says: "We will continue to focus on business customers as we grow to new markets and add new products." ITC DeltaCom, Press Release — ITC DeltaCom to Add Local Service to its Communications Product Package (June 10, 1997) (Ex. 12 hereto) (emphasis added). ITC DeltaCom explained in its press release that because it is "[f]ocused on serving business customers, ITC DeltaCom provides a level of understanding and support that comes from proven experience in meeting the needs and expectations of business operations." Id. Even when touting ITC DeltaCom's broad customer base, the press release made clear that ITC DeltaCom's interest lay exclusively in the business market: "We serve a wide range of business customers, from small businesses to large regional banking, retail and insurance companies, to state government." Id.

Although they need not be considered to find BellSouth eligible to file under Track B, ITC DeltaCom's actions since June 30 confirm that its new promises of residential service are a sham.

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[13] The Compliance Order was issued July 31, 1997 following a Commission vote in public session on July 24; ITC DeltaCom's tariff was filed on July 30.

In July, just weeks before the SCPSC found that no carrier was taking reasonable steps to provide facilities-based residential service in South Carolina, ITC DeltaCom reiterated that it would not seek to win residential customers. Jason Kelly, Tiny Telecom Firm Shoots for BellSouth, Atlanta Business Chronicle, July 11, 1997, at 1A (Ex. 13 hereto).

In late September, ITC DeltaCom was still telling the public that it would provide local exchange service to businesses, rather than residences. See Wright Aff. ¶ 20 (describing ITC DeltaCom's webpage) (Application App. A at Tab 16).

In early October, ITC/DeltaCom's Director of Marketing responded to a question about competition for residential customers by saying: "It's just not our target market." Don Milazzo, Teleport Will "Cherry Pick" from BellSouth, Birmingham Business Journal, Oct. 6, 1997, at 1 (emphasis added) (Ex. 14 hereto).

In late October, two days after ALTS filed Mr. Moses's declaration with its promises to serve residential customers, ITC DeltaCom informed both investors and the Securities and Exchange Commission that: (1) the company serves "mid-sized and major regional businesses;" (2) it "intends to become a leading regional provider of integrated telecommunications services to mid-sized and major regional businesses" and (3) its "business strategy" consists of providing local telephone service "to its existing base of mid-sized and major regional business customers." ITC DeltaCom, Form S-1/A, at 2, 3 (Oct. 22, 1997) (emphasis added) (Ex. 15 hereto).[14] Given the severe consequences (including civil liability) that can attach to inaccurate securities filings, it

[14] In November, ITC DeltaCom has carried out this business strategy in South Carolina by advertising "business communications products" and "service." Greenville Business and Living Magazine at 13 (Nov. 1997) (advertisement).

is reasonable to presume that ITC DeltaCom's statements in its SEC filing are more truthful than Mr. Moses's contradictory effort at blocking BellSouth's application.[15]

Even putting aside the veracity of ITC DeltaCom's representations, those representations are inadequate on their face to defeat BellSouth's eligibility under Track B. Although Mr. Moses suggests some dates by which ITC DeltaCom may begin to compete, Moses Confidential Aff., there is no commitment to provide service within this time frame, let alone a commitment specifically regarding residential service. See DOJ at 8-9 ("DeltaCom . . . is silent as to when it intends to" serve residential customers). The only firm commitment ITC DeltaCom makes is "to serve both residential and business customers" after BellSouth receives Commission approval of its checklist compliance and is granted interLATA authority. Moses Public Aff. ¶ 4. ITC DeltaCom thus nearly acknowledges that it will stay out of the residential market until doing so no longer could prevent BellSouth from securing interLATA relief under section 271.[16]

ALTS argues that ITC DeltaCom is a "qualifying" requester simply because ITC DeltaCom is certified as a CLEC in South Carolina, has filed tariffs in the State, and has negotiated interconnection and collocation agreements with BellSouth. ALTS at 7; Reply

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[15] This Commission, of course, has its own penalties for false statements. See 47 C.F.R. § 1.52; Commission Taking Tough Measures Against Frivolous Pleadings, 11 FCC Rcd 3030 (1996). ALTS itself relied on these provisions to support its demand for sanctions in a different section 271 proceeding. See ALTS Motion to Dismiss and Request for Sanctions, Application by SBC Communications, Inc. for Provision of In-Region InterLATA Services in Oklahoma, CC Docket No. 97-121, at 8-9 (filed April 23, 1997).

[16] As DOJ notes, MCI has taken the same transparent approach of promising local entry after BellSouth obtains section 271 relief, saying "that it will not 'expand into other states in BellSouth's region' until BellSouth has complied with the 1996 Act's requirements in Georgia." DOJ at 9 n.14 (quoting MCI's Henry ¶ 15).

Affidavit of Gary M. Wright ¶ 21 (attached hereto as exhibit 10). But securing the right to compete is quite different from taking reasonable steps to exercise that right. Many carriers have agreements that enable them to compete on a facilities basis in the residential and business markets and the legal entitlement to do so. These facts reflect the efforts of BellSouth and the SCPSC to open local markets to competition. No CLEC, however, has sought to take advantage of these opportunities.

While ITC DeltaCom seeks to disguise its publicly announced business strategy of cherry picking business customers, other opponents suggest that their own inaction somehow constitutes "reasonable steps." AT&T, for example, believes it is enough to state that it plans to test "UNE-based entry" in Kentucky and Florida and "intends soon to begin offering facilities-based local service to business customers" in South Carolina — without mentioning any plans for residential service in South Carolina. AT&T at 51-52.[17] The Department of Justice concluded that "[i]t is not clear when AT&T would begin offering local residential services in South Carolina." DOJ at B-6.[18]

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[17] AT&T suggests that in making its determination that no CLEC is taking reasonable steps to serve residential and business customers on a facilities basis, the SCPSC ignored the possibility that CLECs would purchase UNEs from BellSouth. AT&T at 52. Yet AT&T points to no evidence — either in the SCPSC's record or anywhere else — of any CLEC taking reasonable steps toward initiating this sort of facilities-based competition. Indeed, as BellSouth explained in its Application, no carriers had ordered unbundled loops from BellSouth in South Carolina, and only one carrier had requested an unbundled switch port. Milner Aff. ¶¶ 37, 50 (Application App. A at Tab 9).

[18] USA Today has reported that "AT&T's year-old effort to sell local phone service to consumers has all but stopped . . . ." Steve Rosenbush, USA Today, AT&T Hanging it Up in the Local Phone Market, Nov. 14, 1997, at 3B.

ACSI likewise believes that after announcing publicly it will serve only business customers and taking no steps to market to residential customers, see Wright Aff. ¶ 11, it can now defeat BellSouth's application by declaring for the first time that it "will provide facilities-based service to residential customers through MDUs [multiple dwelling units] and STS [shared tenant service] providers where it makes economic sense." ACSI at 14. ACSI does not point to any steps — let alone "reasonable" steps — that it has taken to carry out this new strategy. See Wright Aff. ¶¶ 10, 13-14. Indeed, in proceedings before the SCPSC at the end of June, a witness reported having requested residential service from ACSI and being told that ACSI "would not give residential service." SCPSC Docket U-22215, Tr. at 84 (June 27, 1997) (testimony of Richard Knight) (Ex. 16 hereto);[19] see also Wright Reply Aff. ¶ 10 (research firm's report documenting ACSI representatives' statements of no South Carolina residential service).

Sprint does not even offer as much as AT&T and ACSI. It lamely "confirm[s]" without any support that Sprint "ha[s] made [a] qualifying reques[t] for access and interconnection such that Track A applies." Sprint at 33; see FCC Public Notice, FCC No. 97-330, at 3 (rel. Sept. 19, 1997) ("All factual assertions made by any applicant (or any commenter) must be supported by credible evidence, or they may not be entitled to any weight."). Likewise, LCI admits it intends to compete as a reseller and has not yet taken any steps toward offering facilities-based service, yet asserts it can foreclose Track B simply by stating that "LCI's business plan calls for it to transition

[19] MCI notes testimony that ACSI "planned to turn up a switch in South Carolina in early 1998," MCI at 10; see AT&T at 52, but ignores that ACSI's public statements made clear that any facilities-based competition from ACSI would focus exclusively on business customers. See Wright Aff. ¶¶ 11-12.

as quickly as possible to providing local exchange and exchange access service to both business and residential customers over its own network platform comprised of UNEs." LCI at i. If LCI's plans were genuine, one might wonder why it chose to negotiate only a resale agreement with BellSouth. See LCI Agreement (Application App. B at Tab 20).

The Commission should see opponents' tactics for what they are: an effort to block interLATA competition without adding to local competition. Only after the SCPSC approved BellSouth's Statement and confirmed BellSouth's eligibility to apply for interLATA relief — and in most cases not until after BellSouth actually filed its application with the FCC — did attorneys for BellSouth's opponents begin making noises about their clients' supposed efforts to compete. The Commission should not reward these efforts to delay competition, but instead should send a message that if CLECs have failed to take concrete steps in the marketplace toward competing for residential and business customers on a facilities basis, they cannot defeat a Bell company's application by professing plans to compete in the future.

D. The SCPSC Accurately Attributed Local Competition Delays to the Business Priorities of CLECs

Having failed to satisfy the Commission's requirement of taking reasonable steps toward competing, CLECs seek to blame BellSouth for their own delays in providing service in South Carolina. See, e.g., Sprint at 38; ACSI at 16-21. After considering all the evidence submitted by CLECs, as well as its experience implementing the 1996 Act over the last year and a half, the SCPSC directly rejected these claims. Indeed, the SCPSC pointed out that ACSI — which now blames its slow pace on BellSouth — candidly admitted below that "ACSI's delays in moving to compete as a switched based local carrier in South Carolina (which will extend at least into 1998)

have been due to ACSI's business decision to allocate its resources elsewhere, not any failure of BellSouth to meet its obligations under the Act." SCPSC at 6 (citing Falvey testimony at 325, 356-60); see also DOJ at 34 ("[O]verall, investment in new facilities appears to have been relatively less attractive to CLECs in South Carolina than in some other states, a fact that may well reflect the demographic and economic characteristics of the state."); Woroch Aff. (Application App. A at Tab 15) (discussing market conditions in South Carolina).

The SCPSC verified that BellSouth makes available each of the checklist items that Congress decided were necessary (and sufficient) for competitors to enter local markets. Compliance Order at 29-59. The PSC further found that CLECs have not taken BellSouth up on these offers because "[t]he entities with the financial and marketing resources to provide effective [local] competition are the same [interexchange carriers] that have a direct financial interest in delaying [BellSouth's] competing in their long distance market." Compliance Order at 66.

In the face of this unequivocal holding by the State commission, AT&T turns around and blames the SCPSC for AT&T's delays in entering local markets in South Carolina. AT&T argues that it has moved more slowly in South Carolina than in other States because the SCPSC was unwilling to force BellSouth to provide UNEs on a pre-combined basis. AT&T at 51; see also Sprint at 38 (blaming the SCPSC's rulings in the AT&T arbitration order for delays). Yet the U.S. Court of Appeals for the Eighth Circuit has twice rejected AT&T's arguments regarding the so-called "UNE platform." Order on Petitions for Rehearing, Iowa Utils. Bd., No. 96-3321, 1997 U.S. App. LEXIS 28652, at *2-4 (8th Cir. Oct. 14, 1997); Iowa Utils. Bd. v. FCC, 120 F.3d 753, 813 (8th Cir. 1997). AT&T gambled its local business on a misreading of the 1996 Act and lost.

Lacking any legitimate business plan for facilities-based entry, AT&T cannot now blame BellSouth or the SCPSC for its failure to take "reasonable steps" toward becoming a Track A carrier.[20]

Sprint argues that even if BellSouth and the SCPSC are not at fault, it simply is "too early" for local competition to develop. Sprint at 38. That is nonsense. CLECs' choices to focus their operations on States such as California, Michigan, and New York, and to serve business rather than residential customers in South Carolina, are freely-made business decisions. BellSouth's local markets are open, as the SCPSC has held, and CLECs must accept the consequences of their strategy to serve only the most profitable business markets on a facilities basis.

E. BellSouth Also Is Eligible to File Under Track A

If the Commission (improperly) considers the actions of CLECs since June 30, 1997, it will find that — in addition to being eligible to file under Track B — BellSouth is eligible to file under Track A due to recent activities. Although MCI had not taken reasonable steps toward providing facilities-based service three months prior to BellSouth's application, it now provides residential service in South Carolina on a facilities basis. Letter from Kimberly M. Kirby, Senior Manager, MCI to William F. Caton, Acting Secretary, FCC (Oct. 16, 1997) ("MCI Ex Parte"). Additionally, ACSI reports that it "provides dedicated, facilities-based local services to hundreds

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[20] In any event, AT&T does not establish that the availability of the UNE platform would enable CLECs to compete more easily for residential, and not just business, customers — a prerequisite under "Track A." CLECs complain that UNE rates are too high to serve residential customers, see, e.g., ACSI at 3 n.3, 16-17, and UNE would likely be more expensive than the resale rate for residential customers whom BellSouth serves at or below cost.

of customers located in scores of office buildings in four separate metropolitan areas" in South Carolina. ACSI at 14-15. Accordingly, MCI and ACSI together fulfill the prerequisites of Track A. See Michigan Order ¶¶ 82-85 (noting that requirements of Track A can be satisfied by a combination of CLECs, rather than the activities of just one CLEC).

MCI indicates that its facilities-based residential service is provided to MCI employees on a "trial" basis. MCI Ex Parte. If, on appeal from the Oklahoma Order, the U.S. Court of Appeals for the D.C. Circuit accepts SBC Communications's position that test service to employees satisfies Track A, then MCI's service necessarily would suffice as well. See Brief for Appellants at 21-24, SBC Communications, Inc. v. FCC, No. 97-1425 (D.C. Cir. Aug. 6, 1997). But even if the Oklahoma Order is sustained on this point, MCI should be held to its own, clearly stated view that "test" service does qualify as telecommunications service under the Communications Act. In a complaint concerning Ameritech's tests of interLATA service, MCI has argued before the Commission that "trial service constitutes the provision of in-region interLATA service." Complaint, MCI v. Illinois Bell Telephone Company, at 6, ¶ 16 (FCC Aug. 8, 1997). It inescapably follows that, in MCI's own view, MCI's facilities-based "trial service" to residential customers qualifies as the provision of "telephone exchange service" to "residential subscribers" under section 271(c)(1)(A).

III. BELLSOUTH HAS SATISFIED ALL FOURTEEN CHECKLIST REQUIREMENTS

BellSouth demonstrated before the SCPSC and again in its Application that it has opened the local market in South Carolina by offering all fourteen checklist items. Opponents of BellSouth's application respond in various ways. First, they note that there are items, such as pre-

combined UNEs and additional performance measurements, that BellSouth does not offer. The short answer is that if BellSouth does not offer a local facility or service, this is because it is not required by the checklist and the Commission is specifically forbidden from mandating that it be offered as a condition of interLATA relief. 47 U.S.C. § 271(d)(4).

Second, the opponents claim (directly or indirectly) that BellSouth cannot prove its offerings are practically available until CLECs actually order them in significant volumes. This argument is just a dressed-up version of the rejected claim that a Bell company must find a buyer for all items to satisfy the checklist. See Michigan Order ¶ 115 ("Given the varying needs of competing LECs, we believe that Congress did not intend to require a petitioning BOC to be actually furnishing each checklist item.").

This argument asks the Commission to do exactly what the 1996 Act forbids — hold back one group of competitors (Bell companies who seek to offer interLATA services) to "protect" another group of competitors (AT&T, MCI, and Sprint). All the checklist requires in a Track A application is that checklist items be legally and practically available, id. ¶ 110; the "genera[l] offering" requirement applicable to Track B applications, 47 U.S.C. § 271(d)(2)(A)(i)(II), certainly is not more demanding. Indeed, the whole point of a Track B application is that a Bell company should not be penalized for CLECs' failures to enter the market. Conference Report at 148. If BellSouth could only show the sufficiency of its checklist offerings by supplying proof of actual CLEC usage, it would incur exactly that penalty. As Chairman Kennard has explained,

"The law [requires] the Bells to show only that the doors to their networks are open, not necessarily that any competitors have walked through them."[21]

Third, the DOJ complains that BellSouth's Statement does not anticipate each and every request a CLEC might make of BellSouth. See, e.g., DOJ at 19-23. As a threshold matter, checklist compliance is outside the antitrust issues Congress wanted the DOJ to consider in assessing Bell company applications.[22] Checklist matters fall instead within the scope of this Commission's consultation with the SCPSC. 47 U.S.C. § 271(d)(2)(B). Moreover, insofar as its views on checklist issues are relevant at all, DOJ ignores that the Statement is not a definitive catalog of everything BellSouth would make available to CLECs upon request. There can be no such catalog, for BellSouth will work with CLECs to accommodate their particular needs. See, e.g., Varner Aff. ¶¶ 29, 32, 34, 38. Trying to include every item a sophisticated carrier such as AT&T or MCI might conceivably want would only make the Statement less useful for smaller carriers that, unlike AT&T and MCI, actually have an interest in utilizing the Statement as a basis for their interconnection agreements. See Id. ¶ 13.

Realistically viewed, DOJ's demand to review model terms regarding speculative future arrangements is just another effort to bring within the section 271 process issues that will properly

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[21] Seth Schiesel, William Kennard: Atop FCC, Still Trying to Be Nice, New York Times, Nov. 10, 1997, at C1.

[22] See 142 Cong. Rec. H1176 (daily ed. Feb. 1, 1996) (statement of Rep. Jackson-Lee) ("substantial weight" to be accorded to the views of the Attorney General is limited to her "expertise in antitrust matters"); id. at H1178 (statement of Rep. Sensenbrenner) ("FCC's reliance on the Justice Department is limited to antitrust related matters").

be resolved in the course of private negotiations and state arbitrations. This Commission should not join in DOJ's power-grab.

Finally, CLECs cite problems that supposedly have arisen in the course of implementing interconnection and resale agreements. There have been some difficulties, as would be expected with new technical arrangements. But operational perfection is not the standard of checklist compliance. Michigan Order ¶ 278 ("holding Ameritech to an absolute-perfection standard is not required by the terms of the competitive checklist"); id. ¶ 203 (same). As explained in BellSouth's Application, BellSouth has appropriately tested its systems and has promptly and responsibly addressed implementation issues as they have arisen. BellSouth also has helped CLECs correct their own mistakes. These steps have ensured the operational readiness of all required checklist items. At the same time, they establish a track record of diligent performance that fully rebuts trumped-up allegations of bad faith or foot-dragging by BellSouth. See SCPSC at 12 ("BellSouth appears to be meeting its duty of remedying problems that arise to ensure nondiscriminatory access to the BellSouth network in accordance with the Act.").

A. Pricing

BellSouth's opponents argue that the Commission may freely review the SCPSC's pricing determinations. Under sections 251 and 252, however, "state commission determinations of the just and reasonable rates that incumbent LECs can charge their competitors for interconnection, unbundled access, and resale" are "off limits to the FCC." Iowa Utils. Bd., 120 F.3d at 804. Because the checklist's pricing standard is that rates for interconnection, UNEs, and resale must be "in accordance with the requirements" of sections 251 and 252, 47 U.S.C. § 271(c)(2)(B)(i),

(ii), (xiv), the SCPSC's express determination that BellSouth's rates satisfy the Act leaves no federal issue for the Commission to decide.[23]

Unprepared to dispute this, yet determined to get its hand into state ratemaking, DOJ dreams up an outlandish theory of federal jurisdiction that — not surprisingly — puts DOJ in the catbird seat. The theory goes like this: While the FCC may not be allowed to second-guess state commission pricing decisions, DOJ can because the Attorney General is free to use "any standard" she likes when assessing Bell company applications. 47 U.S.C. § 271(d)(2)(A).[24] The Commission must give "substantial weight" to DOJ's evaluation. Id. Therefore, DOJ concludes, "[t]he Commission is free to give effect to [DOJ's] Evaluation about the pricing structure," even if the Commission is not allowed to make its own assessment of pricing issues. DOJ at 44-45.

Because the Commission is forbidden to consider pricing issues under the checklist and may not expand the checklist either, see 47 U.S.C. § 271(d)(4), the Commission may not incorporate into its reasoning the DOJ's recommendations on pricing issues. Nor can the Commission blindly accept DOJ's assessment. Section 271(d)(2)(A) contemplates that the Commission will independently assess all relevant issues and will not give DOJ's view's "preclusive effect." As the Supreme Court has explained, it "would make little sense" for

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[23] Given the clarity of the SCPSC's findings, see Compliance Order at 52-59; SCPSC at 7-11, this proceeding does not present the question whether section 271 gives the Commission jurisdiction to review Bell company rates where there has been no state commission determination that the rates comply with the 1996 Act.

[24] DOJ here improperly uses the "any standard" language to evade limits on the scope of its examination. "[A]ny standard" was intended by Congress to refer to the legal standard used by DOJ, see Conference Report at 149 (providing examples), not to authorize DOJ to examine any factual matter it desires.

Congress to establish a "substantial weight" standard unless it intended the decisionmaker to exercise independent judgment.[25]

Indeed, when drafting section 271, Congress specifically decided not to give DOJ the final say on any checklist-related issue. Although DOJ lobbied strenuously for veto power over BOC entry into long distance, Congress consistently rejected its proposals. For example, the so-called Thurmond second-degree amendment, which would have required the Attorney General's approval before any Bell company could provide in-region, interLATA service, see 141 Cong. Rec. S8145-46 (daily ed. June 12, 1995), was defeated because it would have expanded the authority of DOJ. Senator Kerry, who supported the amendment, presented the issue to his colleagues as follows:

> [T]he choice before Members on the tabling motion will be: Trust the 14-point checklist, basically, that the committee has offered as an indication; or do we want, in a parallel process, the Department to make a determination as to whether or not competition exists at the local level. That is all we are discussing and debating. I believe we want the Department of Justice to make that determination. I do not have the confidence in the 14-point checklist that others do. It is as simple as that.

Id. at S8224 (remarks of Sen. Kerry). The amendment was defeated 57 to 43, because the Senate did "have . . . confidence in the 14-point checklist." Id.; see id. at S8195 (statement of Sen. Pressler) (checklist adopted as Congress's "test of when markets are open").

The Commission therefore may not evade limits on its own authority by delegating responsibility to the DOJ. When this Commission makes its determinations under section

[25] University of Tenn. v. Elliott, 478 U.S. 788, 795 (1986).

271(d)(3), it must refrain from placing any reliance on factors that Congress forbade it to consider.

If the Commission did have power to review the SCPSC's pricing determinations — which it does not — the Commission would have to find that the SCPSC's determinations properly implement the 1996 Act. As a threshold matter, opponents are wrong to claim that interim rates for interconnection and UNEs can never satisfy section 252 (and thus the checklist). Sprint at 23-27; MCI at 39; ACSI at 26-27; Vanguard Cellular at 14-15. Section 271 mandates no particular procedures for determining compliance with pricing requirements, and nowhere speaks of the "forward-looking methodologies" upon which DOJ apparently insists. See DOJ at 36-37, 39 (requiring "consisten[cy] with [DOJ's] open-market standard"). In fact, DOJ and the Commission jointly conceded before the Eighth Circuit that "[t]he core terms in section 252(d) — 'just and reasonable' rates based on 'cost' — are elastic terms in ratemaking, for which 'neither law nor economics has yet defined generally accepted standards.'" Brief for Respondents Federal Communications Commission and United States of America at 47, Iowa Utils. Bd. v. FCC, No. 96-3321 (8th Cir. filed Dec. 23, 1996).

The Commission recognized the need for interim rates when it established default proxies in the Local Interconnection Order. As the Commission there explained, "it may not be possible for carriers to prepare, or the state commission to review, economic cost studies within the statutory time frame for arbitration," id. ¶ 767, or, for that matter, within the quick time-frame Congress established for section 271 applications. See 47 U.S.C. § 271(c)(1) (allowing Track A applications immediately and Track B applications 10 months after enactment). The SCPSC

followed the Commission's recommended route precisely; it imposed interim rates in the AT&T Arbitration — after considering cost data submitted by BellSouth as well as cost-based contractual and tariff rates — and required BellSouth to submit complete cost studies ninety days later.[26]

The SCPSC specifically addressed concerns that an interim approach might "chil[l]" local competition because of the possibility of an upward adjustment. Compliance Order at 58; SCPSC at 8-9. Under the SCPSC's order, CLECs can do no worse than the interim rates for any orders they place while those rates are in effect, and they will receive retroactive downward adjustments if permanent cost studies so dictate. Compliance Order at 58, SCPSC at 8-9; cf. DOJ at 40 (noting that threat to competition arises only "if there is a substantial risk" of rate "increases") (emphasis added). [27]

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[26] See Order on Arbitration at 14-15, Petition of AT&T Communications of the Southern States, Inc. for Arbitration of an Interconnection Agreement, Docket No. 96-358-C, Order No. 97-189 (SCPSC Mar. 10, 1997) ("AT&T Arbitration Order"), Application App. B at Tab 69. The SCPSC-approved rates generally fall below the FCC's proxies and in many cases reflect rates negotiated by ACSI under the guidelines of sections 251 and 252. See BellSouth Br. At 35-36, 43, 52; Compliance Order at 53-55. In that regard, DOJ attacks a straw man — arguing that "[t]he fact that a rate has been negotiated in an interconnection agreement provides no basis for concluding that such a rate is competitively appropriate on a permanent basis for all parties." DOJ at 42. DOJ misses the point that the SCPSC adopted the ACSI rates only until complete cost studies could be reviewed, not on a permanent basis.

[27] Contrary to DOJ's assertions, this one-way true-up regime applies not only to items that CLECs already have received but also to "elements ordered in the interim." DOJ at 43; see Varner Aff. ¶¶ 32. Although DOJ complains that "many of the prices" in the Statement would not be subject to true-up, DOJ at 43, the only rates that are not subject to true-up are those for which cost-based prices identical to existing tariff rates were approved by the SCPSC. See Varner Aff. ¶ 31. It also ignores that "all rates in the Statement will be replaced by rates based on newly filed cost studies." Id.

Sprint's complaint that BellSouth "does not have any prices at all for OSS" is essentially an extension of its attack on interim prices. Sprint at 19 & n.54. Sprint does not explain how BellSouth's offer to provide OSS access for free could possibly hinder competition or violate the Act.

Opponents also attack BellSouth's SCPSC-approved rates because they are not "deaveraged." AT&T at 40; AT&T's Wood ¶¶ 16-17; MCI at 41; Sprint at 20-21; ACSI at 25; ALTS at 22. As BellSouth explained in its Application, the Act does not require rate deaveraging. In the SCPSC's proceedings, moreover, CLECs did not ask BellSouth to deaverage its rates. Varner Aff. ¶ 37. "BellSouth is not categorically opposed to deaveraging," but this is an issue interested CLECs should address to the SCPSC. See id. ¶ 38 ("unbundled [local] loop rates should not be deaveraged until such time as the state commission can fully evaluate all the implications of such a policy change").

Finally, opponents complain that the wholesale discount for resellers is too low. See AT&T at 43-46; AT&T's Carroll ¶ 30; AT&T's McFarland Public Version ¶¶ 19-25; AT&T's McNeely ¶¶ 45-46; Telecommunications Resellers at 23. This complaint is presented to the wrong body — as the Commission has no jurisdiction over pricing — and in any event lacks merit. See generally Woroch Aff. ¶ 40; Cochran Aff. ¶ 31. The SCPSC "established that rate in the AT&T arbitration. . . based upon appropriate adjustments to BellSouth's costs that reasonably can be avoided when BellSouth sells its services at wholesale. These adjustments included taking into account costs which would be avoided due to direct routing of calls to AT&T." SCPSC at 9.

B. UNE Combinations

In accordance with section 271(c)(2)(B)(ii), BellSouth's Statement and SCPSC-approved agreements provide nondiscriminatory access to all network elements identified in the Commission's rules, on an unbundled basis, at any technically feasible point. Statement § II & Attach. C. This is not just the opinion of BellSouth, but of the SCPSC, which concluded that the Statement "provides CLECs with nondiscriminatory access to network elements in accordance with the requirements of the Act." Compliance Order at 40.

Nevertheless, CLECs continue to insist that BellSouth must provide UNEs on a pre-combined, "switch-as-is" basis at a cost-based rate. See e.g. AT&T at 19-20, 22; WorldCom at 15; CompTel at 9, 15; LCI at 10-14. These CLECs seem to believe that if they continue to repeat their demand, mantra-like, it will somehow become a reality. Yet both the SCPSC and the Eighth Circuit have rejected the CLECs' claim of entitlement to a quasi-resale option that undercuts Congress's wholesale pricing formula. The Eighth Circuit has done so not just once, but twice. Order on Petitions for Rehearing at 2, Iowa Utils. Bd. v. FCC, No. 96-3321 (8th Cir. October 14, 1997). In the Court's words, the Act does not "levy a duty on the incumbent LECs to do the actual combining" of the network elements for CLECs. Id. While AT&T sputters that this ruling "is irreconcilable with the plain language of the statute," AT&T at 20, the Act states clearly that incumbent LECs "shall provide" network elements "on an unbundled basis," "in a manner that allows requesting carriers to combine such elements . . . ." 47 U.S.C. § 251(c)(3) (emphasis added). See Order on Petitions for Rehearing at 2.

AT&T also finds the Eighth Circuit's understanding of the word "unbundled" too "restrictive." AT&T at 20. According to AT&T, the word should not be understood to mean "physically separated." Id. In support of its definition of "unbundled," AT&T points to Commission rulings that predate the 1996 Act. Id. at 21. But regardless of how the Commission defined the word "unbundled" in different contexts, the plain language of section 251(c)(3) makes clear that in that provision, "unbundled network elements" do not include "pre-combined network elements." AT&T's reading is simply irreconcilable with the requirement that unbundled elements be provided "in a manner that allows requesting carriers to combine such elements."

CompTel asserts that if its members were able to obtain the "platform" at cost-based rates, there would never be a service "disconnection" when a customer changes local service providers. CompTel at 10. What CompTel refers to as a "disconnection" is in fact the rendering of an unbundling service by BellSouth. Milner Reply Aff. ¶ 3. Specifically, during the process of loop conversions from BellSouth to a CLEC, the customer's loop is physically removed from the BellSouth switch and then reconnected to the CLEC switch. See Milner Aff. ¶ 44. If CompTel is genuinely concerned about avoiding this step, which is a necessary part of network unbundling where CLECs order loops under the terms of the 1996 Act, it can operate as a reseller. See Milner Reply Aff. ¶ 3 (noting that a "CLEC can reduce the outage period by electing to have BellSouth provide manual order conversion").

AT&T contends that if it cannot have pre-combined network elements at a cost-based rate, then BellSouth must provide not only "the opportunity to combine elements using [AT&T's] own equipment in collocated space, but the direct 'access to [BellSouth's] network.'" AT&T at

22. Such access would involve serious risks to the network. Varner Reply Aff. ¶ 25. The Eighth Circuit, in fact, has never suggested that a CLEC may obtain unlimited access to an incumbent LEC's network and facilities for the purpose of combining UNEs. To the contrary, the Eighth Circuit emphasized that "the degree and ease of access that competing carriers may have to an incumbent LEC's networks is . . . far less than the amount of control that a carrier would have over its own network." Iowa Utils. Bd., 120 F.3d at 816. Specifically, the Act indicates that an incumbent LEC will provide access to its UNEs at a dedicated collocation space located at the premises of the incumbent LEC. See 47 U.S.C. § 251(c)(6) (incumbent LEC must provide "for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier."). If a LEC demonstrates that physical collocation is not practical "for technical reasons or because of space limitations," the incumbent LEC may instead offer "virtual collocation" for this purpose. See id.

BellSouth has made collocation space available to CLECs, and as a general rule will deliver UNEs to this collocation space. See Varner Aff. ¶ 74; Milner Aff. ¶ 28; Varner Reply Aff. ¶ 24. There is no truth to AT&T's claim that BellSouth allows CLECs to combine only two elements, the loop and port, in collocated space. See AT&T at 22. BellSouth includes a number of combinations among its standard offerings. See Varner Reply Aff. ¶ 21. And, BellSouth will deliver network elements to a collocation space for CLECs to combine themselves. Id. ¶¶ 20, 24.

Where obtaining access to the UNE at the CLEC's collocation space is not practical, BellSouth will make access available at another appropriate location. Id. For instance, BellSouth provides CLECs access to the network interface device ("NID") on an unbundled basis at the end

user's premises (as well as in combination with other subloop elements that BellSouth offers). See Varner Aff. ¶¶ 87, 88; Varner Reply Aff. ¶ 21; Statement § IV.B.4, Attach. C at 28.

The collocation provision of section 251(c)(6) is the Act's only statutory authorization for CLEC entry into the premises of an incumbent LEC for the purpose of combining UNEs. Lacking additional statutory authority, the Commission may not require further CLEC access to the central office or other facilities of incumbent LECs. To do so would work an impermissible expansion of the Commission's statutory authority. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) ("We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."); Bell Atlantic Telephone Co. v. FCC, 24 F.3d 1441, 1447 (D.C. Cir. 1994) (holding that the pre-1996 Act "does not expressly authorize an order of physical collocation, and thus the Commission may not impose it.").

In the Bell Atlantic case, the Commission had ordered incumbent LECs to provide collocation space within their central offices to competitors, so that the competitors could install their own circuit terminating equipment. Id. at 1444. The LECs would have recovered their "reasonable costs" of providing collocation. Id. at 1445 n.3. Yet, at the time that the Commission issued this requirement, the Act did not contain express language authorizing this access to the facilities of incumbent LECs. Id. at 1446. The Court of Appeals therefore vacated the order on the basis that the Act did "not supply a clear warrant to grant third parties a license to exclusive physical occupation of a section of the LECs' central offices." Id.

Congress was aware of this limitation in drafting the 1996 Act, and for this reason expressly provided for collocation. See 47 U.S.C. § 251(c)(6); H. R. Rep. No. 104-204, pt. 1 at 73 (1995). Had Congress intended to grant CLECs a further right of physical access to the facilities and networks of incumbent LECs in connection with their responsibility for recombining UNEs, it would have included the necessary statutory language authorizing this access. Congress did not do so, thus establishing that any further encroachments on incumbent LECs' property rights are beyond the Commission's power.

Although DOJ does not support AT&T's effort to usurp control over BellSouth's network, DOJ seeks to shift the burden to BellSouth to anticipate the possible future requests of carriers that may wish to combine UNEs in South Carolina. DOJ argues that BellSouth should have included in its Statement a full-blown description of "how BellSouth will provide unbundled elements in a manner that will allow them to be combined by requesting carriers." DOJ at 19-20. According to DOJ, the Statement should "specify what BellSouth will provide, the method in which it will be provided, [and] the terms on which it will be provided." Id. at 20.

Since smaller CLECs have not expressed any concern for such terms, DOJ apparently is seeking to advance the interests of the major incumbent interexchange carriers. Yet DOJ misses that the purpose of a statement of generally available terms and conditions is, by definition, to provide standard terms for all CLECs. See Varner Aff. ¶ 13 ("The Statement was developed in a manner that is as straightforward and simple as possible, while at the same time meeting the requirements of the Act."). Although goliaths like AT&T and MCI may decide in the wake of the

Eighth Circuit's decision that they have needs regarding UNE combinations, it is not the purpose of the Statement to respond to individual CLECs' hypothetical requests.

Indeed, the large CLECs have sought to negotiate or arbitrate individually tailored agreements in South Carolina, and thus are not even interested in the contents of BellSouth's Statement. DOJ's suggestion that additional terms in the Statement are necessary to benefit these carriers is simply an attempt to secure a federal right of pre-review over terms that might (or might not) be incorporated into carrier-specific agreements. Nor has BellSouth delayed negotiations on these issues. The reason why negotiations have not produced concrete terms of the sort the DOJ would like to see is that CLECs have spent their time demanding pre-combined UNEs, rather than discussing the details of their own UNE combinations. See Varner Reply Aff. ¶ 32.

The Eighth Circuit's rejection of the "UNE platform" approach espoused by some CLECs confirms the longstanding position of BellSouth and other incumbent LECs. It does not constitute grounds for requiring Bell companies to return to their respective state commissions to obtain approval of revised statements of terms and conditions before re-applying for interLATA relief. This is particularly true in BellSouth's case, where the Statement currently contains the methods and terms that will be used to provide UNEs for combining by CLECs. Varner Reply Aff. ¶¶ 32-35. If DOJ's view were to prevail on this point, and BellSouth were required to go back to the SCPSC with proposed revisions to the Statement each time CLECs shift their business

plans, then BellSouth could be caught in an endless loop of amendments and new CLEC demands. The DOJ's "flavor of the month" approach to BellSouth's Statement should be rejected.[28]

C. Nondiscriminatory Access to Operations Support Systems

To satisfy its obligations under the 1996 Act, BellSouth has devoted millions of dollars and countless man-hours to ensuring that CLECs have nondiscriminatory access to BellSouth's systems. BellSouth has developed, implemented, and made commercially available new OSS interfaces, and has established new centers staffed with hundreds of employees that are dedicated exclusively to servicing CLECs. These efforts have been successful, as the SCPSC found. Compliance Order at 32-40.[29]

The most powerful evidence of BellSouth's compliance with the OSS access requirements is the lengths to which BellSouth has gone to address CLECs' concerns. Problems identified by CLECs have been fixed promptly and BellSouth is working to develop customized interfaces for any CLEC so wishing. See Stacy OSS Aff. ¶ 42. Indeed, many of the supposed problems cited by CLECs in this proceeding were resolved long before BellSouth filed its Application. It appears that in reflexive opposition to BellSouth's application, some commenters have failed to determine

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[28] In any event, the Varner Reply Affidavit explains that BellSouth has demonstrated — as DOJ desires — what BellSouth will provide, how it will provide it, and terms upon which it will be provided. Varner Reply Aff. ¶ 30-35.

[29] The SCPSC was not alone in making such findings. After inspecting BellSouth's OSS interfaces and procedures and giving opponents an opportunity to prove alleged deficiencies in a live demonstration, the Louisiana PSC determined that BellSouth's systems "do in fact work and operate to allow potential competitors full non-discriminatory access." Order U-22252-A, Consideration and Review of BellSouth Telecommunications, Inc.'s Preapplication Compliance with Section 271 of the Telecommunications Act of 1996, Docket. U-22252, at 4-5, 15 (LPSC rel. Sept. 5, 1997).

whether any real issues still exist.[30] ACSI, for instance, contends that BellSouth is only now "in the process of developing and making available its LENS and EDI interfaces." ACSI at 47-48. Similarly, ITC DeltaCom claims it must rely on manual processes for ordering resold lines. ALTS at 23. Both claims are simply incorrect. EDI which has been used in various contexts for 30 years, has been available for CLEC access since December, 1996; LENS has been available since April 28, 1997. EDI and LENS are now being used operationally by more than two dozen CLECs. Stacy OSS Aff. ¶ 110 & Exs. 38-40. Nor can there be any contention that BellSouth will withdraw either interface after section 271 relief is granted. MCI at 12-13. Both LENS and EDI are specifically identified in BellSouth's SCPSC-approved agreements, such as that between AT&T and BellSouth.

Several CLECs brazenly attempt to use the section 271 process as an opportunity to gain OSS access beyond that required under sections 251 and 252. WorldCom, for instance, contends that the use of any manual processes is evidence that a section 271 applicant is not providing nondiscriminatory access to OSSs, even if BellSouth uses manual processing in its comparable retail operations. WorldCom at 8. DOJ likewise suggests that "machine-to-machine" interfaces are somehow a requirement of the Act, regardless of the capabilities of other electronic interfaces.

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[30] Opponents' complaints about billing offer an example. MCI's King complains that BellSouth does not provide billing information in the industry standard format, CABS, see MCI's King ¶¶ 208-215, but ignores that (1) BellSouth has developed a process to provide MCI with billing information in a CABS format, and, in any event, (2) CABS is not the "industry standard," as the Ordering and Billing Forum has not defined standards for all aspects of local competition billing. Reply Affidavit of David Hollett ¶ 3 (attached hereto as exhibit 3). Likewise, MCI is just wrong when it claims a CRIS bill does not provide usage data or call detail. See id. ¶ 5.